Supreme Court of the United States

October Term, [illegible] 51

No. [illegible], Original.

UNITED STATES OF AMERICA, *Plaintiff*,

v.

STATE OF LOUISIANA.

PETITION FOR REHEARING.

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Appearing specially for the sole and only purpose of opposing the motion for leave to file a complaint against Louisiana.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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UNITED STATES OF AMERICA, *Plaintiff*,

v.

STATE OF LOUISIANA.

PETITION FOR REHEARING.

Comes now the State of Louisiana and, on the contingency set forth hereinafter, petitions the Court for a rehearing of its decision granting the motion of the Federal Government for leave to file a complaint herein, and in support thereof shows:

1. This Court Granted the Motion "Of Course" and Did Not Decide the Question of Jurisdiction Over Louisiana.

The Court's decision of the motion is stated as follows:

> "The motions for leave to file complaints are granted and process is ordered to issue returnable on or before September 1, next. Mr. Justice Jackson took no part in the consideration or decision of these applications."

Since no opinion was written nor authority cited, it seems clear that it was not the intention of the Court in the one-

line statement to decide the important question of jurisdiction over Louisiana as a party to the proposed lawsuit, a question that goes to the vitals of our dual system of government. Indeed, the previous decisions of this Court establish clearly and without ambiguity that the accepted practice on such questions of jurisdiction is to grant the motion for leave to file "of course", postponing the question of jurisdiction until after process has issued.

In *Washington* v. *Northern Securities Company* (1902), 185 U. S. 254, the State of Washington sought leave to file a complaint against various defendants, notice was given to the defendants, and oral argument was had in which the defendants opposed the motion on jurisdictional grounds. Nevertheless, the motion was granted, the Court saying that **"Ordinarily . . . the motion for leave to file is granted as matter of course."**

The opinion of Chief Justice Fuller, among other things, says:

> "This is an application by the state of Washington for leave to file an original bill in this court against the Northern Securities Company, a corporation of New Jersey; the Great Northern Railway Company, a corporation of Minnesota; and the Northern Pacific Railway Company, a corporation of Wisconsin. Notice was given to the proposed defendants, and argument had in support of and against the motion. The usual practice in equity cases has been to hear such applications *ex parte* (*Georgia* v. *Grant*, 6 Wall. 241, 18 L. Ed. 848), although under special circumstances a different course has been pursued. *Mississippi* v. *Johnson*, 4 Wall. 475, 18 L. Ed. 437. Ordinarily, as stated by the chief justice in the latter case, the motion for leave to file is granted as matter of course. 4 Wall. 478, 18 L. Ed. 438."
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> "In *Louisiana* v. *Texas*, 176 U. S. 1, 44 L. ed. 347, 20 Sup. Ct. Rep. 251, the case stated shows that 'argument was had on objections to granting leave, but it appearing to the court the better course in this in-

stance, leave was granted, and the bill filed, whereupon defendants demurred, and the cause was submitted on the oral argument already had and printed briefs.'

"In *Minnesota* v. *Northern Securities Co.* (decided at this term) 184 U. S. 199, ante, 499, 22 Sup. Ct. Rep. 308, application to file a similar bill to that before us, and seeking similar relief, was made, and after examining the bill we directed notice to be given, and heard argument on both sides. The result was that leave to file was denied because of the want of certain indispensable parties, who could not be brought in without defeating our constitutional jurisdiction. That insuperable difficulty does not meet us on the threshold here, but among other objections to granting leave, it is urged that the court would have no jurisdiction over the subject-matter because, as contended, the bill does not present the case of a controversy of a civil nature which is justiciable under the Constitution and laws of the United States, in that the suit is purely a suit for the enforcement of 'the local law and policy of a sovereign and independent state, whose right to make laws and to enforce them exists only within itself and by means of its own agencies, and is limited to its own territory.'

"In the exercise of original jurisdiction the court has always necessarily proceeded with the utmost care and deliberation, and, in respect of all contested questions, on the fullest argument; and in the matter of practice we are obliged to bear in mind, in an especial degree, the effect of every step taken in the instant case on those which may succeed it. In view of this it seems to us advisable to take the same course on the pending application as was pursued in *Louisiana* v. *Texas:* that is, **without intimating any opinion whatever on the questions suggested, to grant leave to file in accordance with the usual practice.** Our rules require service sixty days before the return day of process, but as the final adjournment of the term will have taken place within that time, process will be made returnable on the first day of next term. (Emphasis added.)

"Leave is granted and process will issue accordingly."

The same thing happened in *Louisiana* v. *Texas* (1900), 176 U. S. 1. Oral argument was had on objections to the jurisdiction of this Court on the motion for leave to file a complaint, but the Motion was granted, whereupon the defendants raised the jurisdictional grounds by demurrer, and the complaint was then dismissed for lack of jurisdiction.

The logic of these decisions is specially applicable to the present motion, inasmuch as at the time of granting the motion for leave to file process had not issued; Louisiana was not a purported party to the proposed lawsuit, in any sense whatever, and thus this Court had not in any sense attempted to subject Louisiana to its jurisdiction. From the standpoint of the mechanics of litigation, Louisiana cannot properly assert lack of consent to be sued until after service of process purports to subject her to suit. Until then, the issue of jurisdiction over Louisiana as a party is not before the Court.

2. No Answer Has Yet Been Suggested to Louisiana's Basic Arguments.

We do not believe this Court could have intended to decide the question of jurisdiction on the motion, for the additional reason that, on a question of such magnitude, there has not been any suggestion of an answer to Louisiana's basic arguments. These are:

A. Except for Suits Between States, the Constitution Does Not Provide for Suit Against a State Without Its Consent.

1. In the original jurisdiction of this Court: *Duhne* v. *New Jersey*, 251 U. S. 311, *Monaco* v. *Mississippi*, 292 U.S. 313. See our brief, p. 2.

The *Duhne* case held that a State could not be sued without its consent *in this Court*, by an individual. It also held that Article III, Section 2, Clause 2, did not grant the consent of a State to be sued in the original jurisdiction

of this Court. The opinion of Mr. Chief Justice White, among other things, said:

> "It is urged, however, that although this may be the general rule, it is not true as to the original jurisdiction of this court, since the second clause of Sec. 2, article 3, of the Constitution, confers original jurisdiction upon this court 'in all cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be a party, . . .' In other words the argument is that the effect of the clause referred to is to devest every state of an essential attribute of its sovereignty by subjecting it without its consent to be sued in every case if only the suit is originally brought in this court. Here again the error arises from treating the language of the clause as creative of jurisdiction instead of confining it to its merely distributive significance according to the rule long since announced, as follows: 'This second clause distributes the jurisdiction conferred in the previous one into original and appellate jurisdiction, but does not profess to confer any. The original jurisdiction depends solely on the character of the parties, and is confined to the cases in which are those enumerated parties, and those only.'' *Louisiana* v. *Texas* 176, U. S. 1, 16, 44 L. ed. 347, 353, 20 Sup. Ct. Rep. 251. That is to say, the fallacy of the contention consists in overlooking the fact that the distribution which the clause makes relates solely to the grounds of Federal jurisdiction previously conferred, and hence solely deals with cases in which the original jurisdiction of this court may be resorted to in the exercise of the judicial power as previously given. In fact, in view of the rule now so well settled as to be elementary, that **the Federal jurisdiction does not embrace the power to entertain a suit brought against a state without its consent**, the contention now insisted upon comes to the proposition that the clause relied upon provides for the exercise by this court of original jurisdiction in a case where no Federal judicial power is conferred." (Emphasis added.)

If the clause of Article III, section 2, clause 2, "all cases . . . . in which a State shall be party . . . ." did not grant

the consent of a State to be sued in this Court by an individual, it certainly did not grant the consent of a State to be sued in this court by the Federal Government.

Especially is this undeniable since five times the Constitutional Convention declined to give this Court jurisdiction of controversies between the United States and any particular State. See our brief, pages 2-4, and 8.

Moreover, the clear fact that the Constitution does not entitle the Federal Government to sue an individual in the original jurisdiction of this Court must be considered. In view of the jealousy of the States toward the newly-created Federal Government at the time of drafting the Constitution, we must remember that the Founding Fathers never intended to subject their own States, without their consent, to suit by the Federal Government, more readily than individuals were to be subjected to such suit. This confirms that the Founding Fathers never intended to empower the Federal Government to sue a State without its consent.

2. By a Foreign State: *Monaco* v. *Mississippi*, 292 U. S. 313.

3. By an Individual: *Duhne* v. *New Jersey*, 251 U. S. 311; *Hans* v. *Louisiana*, 134 U. S. 1.

4. By a Corporation: *Great Northern Life Ins. Co.* v. *Read*, 322 U. S. 47; *Smith* v. *Reeves*, 178 U. S. 436.

B. No Consent Can be Assumed From the Texas Case.

Assuming that the *Texas* case enunciated, *de hors* the Constitution, a theory of mutuality, that is, that the Founding Fathers, in their turn, had assumed that both the Federal Government and the States had consented to be sued by the other branch, that theory of mutuality has been irretrievably crushed by *Kansas* v. *United States*, 204 U. S. 331, and *Duhne* v. *New Jersey*, 251 U. S. 311. The *Kansas* case held that the Federal Government may not

be sued by a State without its consent in the original jurisdiction of this Court. The *Duhne* case, *supra*, held that Article III, section 2, clause 2, did not grant the consent of a State to be sued in this Court.

C. So Far as Immunity to Suit is Concerned, the State and Federal Governments Are Exactly Equal.

This argument, set forth on page 21 of our brief, has not been answered, and we know of no answer that can be made to it.

CONCLUSION.

The question of jurisdiction of this Court over Louisiana as a party was not presented as an issue to this Court, on the motion for leave to file a complaint against Louisiana, because nothing had been done to attempt to subject Louisiana to the jurisdiction of this Court. Hence, this Court granted the motion more or less "of course". The question of jurisdiction over Louisiana can only be raised by motion after process is served on Louisiana.

On the foregoing basis the petition for rehearing should be denied. But if this Court should be further interested in the question of jurisdiction at this time, then the petition for rehearing should be granted, and the cause should be immediately restored to the docket for reargument at this term, in order to explore to the full this question,

which is of such great importance to the States and to the Nation.

Respectfully submitted,

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Appearing specially for the sole and only purpose of opposing the motion for leave to file a complaint against Louisiana.

May, 1949.

CERTIFICATE OF COUNSEL.

I hereby certify that the foregoing Petition for a rehearing is presented in good faith and not for delay.

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